IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 86044
	)	
JOHN TALLY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF DALLAS COUNTY, MISSOURI
THIRTIETH JUDICIAL CIRCUIT
THE HONORABLE THEODORE B. SCOTT, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

A Dallas County jury convicted John Tally of manufacturing a controlled substance, Section 195.211, RSMo 2000. The Honorable Theodore B. Scott sentenced Mr. Tally to a term of fifteen years. After the Southern District of the Court of Appeals reversed the conviction and remanded for a new trial, this Court granted the State's transfer application pursuant to Rule 83.04, and it has jurisdiction pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

STATEMENT OF FACTS

On September 2, 2002, a Missouri Highway Patrol helicopter pilot and a Webster County Deputy spotted what appeared to be two patches of marijuana plants in rural Webster County (Tr. 4-5, 13, 173, 175). They advised Investigator Rick Hamilton, who went to the residence indicated (Tr. 5, 102, 149). Investigator Hamilton spoke to Joe Horman, whose family owned the house and acreage; he denied ownership or knowledge of the plants (Tr. 6, 11, 102, 133).

After the first call to Investigator Hamilton, the officers in the helicopter saw a man in the field near the plants (Tr. 20, 150, 168). He was about fifty yards from one patch of marijuana and one hundred yards from another (Tr. 169, 176). The closer patch was well camouflaged by dense undergrowth (Tr. 122, 181). The man did not have anything in his hands and was just standing, looking up at the helicopter (Tr. 158, 178). The pilot motioned for the man to go toward the house and followed behind him in the helicopter (Tr. 20, 150, 168). One of the officers radioed Investigator Hamilton that a man was on the property behind the house (Tr. 6, 11). Joe Horman gave permission for Investigator Hamilton to go further onto the property, and as the officer did so, he saw John Tally, appellant, approaching (Tr. 6, 103).

The helicopter followed behind Mr. Tally until Investigator Hamilton ordered him to stop, get down on his knees, and put his hands in the air (Tr. 20, 6, 14-15, 24, 124). Investigator Hamilton was not armed and needed to see Mr. Tally's waistband to determine if there was a weapon there (Tr. 6-7, 14-15, 104-

105). Investigator Hamilton told Mr. Tally that they had located some marijuana plants on the property, and he denied they belonged to him (Tr. 106).

Mr. Tally told Investigator Hamilton that he was just looking for rocks and asked if he was under arrest (Tr. 7, 9). The investigator replied "no, not at this time," because he did not have enough information to arrest Mr. Tally yet (Tr. 8-9). Then Investigator Hamilton "bluffed" Mr. Tally, asking him if he knew what a box camera was and implying that a box camera had photographed Mr. Tally tending the plants (Tr. 8, 15-16, 106-107). Investigator Hamilton intended to arrest Mr. Tally when he admitted that the plants were his (Tr. 11), and used the technique in order to elicit information from Mr. Tally (Tr. 125).

Mr. Tally told Investigator Hamilton that he had six to eight marijuana plants on the property, gesturing as to their height, and said that they were for his personal use (Tr. 8, 16, 107, 152). About that time, Deputy Eugene Wood exited the helicopter, which had landed behind Mr. Tally, and joined them (Tr. 9, 21, 25). Mr. Tally was still on the ground when Deputy Wood walked up behind him (Tr. 25, 160). The deputy heard Mr. Tally tell Investigator Hamilton that the plants were for his personal use only (Tr. 26). Investigator Hamilton told the deputy to arrest Mr. Tally, who was handcuffed as he got up off the ground (Tr. 27, 108, 160). Investigator Hamilton advised Mr. Tally of his rights under **Miranda**[1] on the way to the patrol car (Tr. 10, 17, 108, 161). Mr. Tally began to curse (Tr. 10, 17, 108, 161).

After the officers put Mr. Tally in the patrol car, they photographed the plants and pulled them up (Tr. 109, 154). There were about 13 plants in two patches about 150 yards apart (Tr. 111, 113-114, 175). The plants in one patch were a different species than the other (Tr. 173). They bagged the plants and sent them to the State Highway Patrol Laboratory, where testing showed the plants were marijuana with a total weight of 386 grams (Tr. 111, 184, 188).

Webster County charged John Tally with manufacturing more than five grams of marijuana, Section 195.211, RSMo 2000, by Information filed in November 2002 (L.F. 8). Following a change of venue to Dallas County, the Honorable Theodore B. Scott heard a motion to suppress and a motion to reveal the confidential informant on March 17, 2003 (L.F. 14-16; 17-18; Tr. 2-45). Judge Scott overruled both motions (L.F. 5, Tr. 40, 45). The State filed an amended felony information before trial on April 3, 2003, alleging that Mr. Tally was a persistent felony offender (L.F. 5, 9-11), and proved up his status as a persistent offender before the opening of evidence (Tr. 49). Judge Scott declared a mistrial after the jury had deliberated for three hours (L.F. 5).

The second trial was held on May 14, 2003 (L.F. 5-6, Tr. 50). In addition to evidence summarized above, Mr. Tally testified, as he had at the hearing on the motion to suppress, that he did not know about the marijuana plants (Tr. 194, 30), and denied making any incriminating statements (Tr. 196-197, 32, 34-35). Mr. Tally explained that he was looking for arrowheads on the Horman farm and had

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[1] **Miranda v. Arizona,** 384 U.S. 436 (1966).

been there for that purpose three or four times during the summer (Tr. 192). He testified that the helicopter followed him very closely after the pilot motioned for him to go toward the house (Tr. 196), and that he remained kneeling through all of Investigator Hamilton's questioning (Tr. 197). Mr. Tally admitted that he had multiple felony convictions, but noted that all of the previous convictions followed pleas of guilty (Tr. 199-203).

Joe Horman testified that in June 2002 he gave Mr. Tally permission to look for rocks on his property, and he came two or three times over the summer (Tr. 130-132). Mr. Horman said that numerous people, including non-family members, had permission to be on the land to hunt "and things like that." (Tr. 120, 131, 136, 143). He recalled that Mr. Tally remained on the ground while Investigator Hamilton questioned him (Tr. 141), and was still kneeling down when Deputy Wood arrived and handcuffed him (Tr. 145).

After the jury had been out for about two hours, Judge Scott inquired as to the numerical split, then instructed them to return to deliberations (Tr. 224-225). After a period of time, the jury returned with a verdict of guilty (Tr. 225, L.F. 34). On July 1, 2003, Judge Scott sentenced Mr. Tally to a term of fifteen years imprisonment (Tr. 234, L.F. 39-40). Notice of appeal was timely filed (L.F. 41-42).

POINT RELIED ON

The trial court erred in overruling Mr. Tally's motion to suppress his statement admitting that the marijuana plants belonged to him, and permitting the statement into evidence over his objections at trial, in violation of Mr. Tally's rights to due process and to be free from compelled self-incrimination, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution, because the statement should have been excluded as presumptively coerced since Investigator Hamilton elicited it in a custodial interrogation without first advising Mr. Tally of his constitutional rights to assistance of counsel and protection from compelled self-incrimination. The statements were prejudicial because without them the evidence was insufficient to support a finding of guilty, since the only other incriminating evidence was Mr. Tally's proximity to the plants when spotted by the officers in the helicopter.

Miranda v. Arizona, 384 U.S. 436 (1966);

State v. Birmingham, 132 S.W.3d 318 (Mo. App., S.D. 2004);

State v. Werner, 9 S.W.3d 590 (Mo. banc 2000);

United States Constitution, Amendments V and XIV;

Missouri Constitution, Article I, Sections 10 and 19; and

Rule 29.11.

ARGUMENT

The trial court erred in overruling Mr. Tally's motion to suppress his statement admitting that the marijuana plants belonged to him, and permitting the statement into evidence over his objections at trial, in violation of Mr. Tally's rights to due process and to be free from compelled self-incrimination, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution, because the statement should have been excluded as presumptively coerced since Investigator Hamilton elicited it in a custodial interrogation without first advising Mr. Tally of his constitutional rights to assistance of counsel and protection from compelled self-incrimination. The statements were prejudicial because without them the evidence was insufficient to support a finding of guilty, since the only other incriminating evidence was Mr. Tally's proximity to the plants when spotted by the officers in the helicopter.

The claim and the standard of review

Investigator Hamilton and Deputy Wood testified that Mr. Tally admitted he had marijuana plants on the Horman farm for his personal use (Tr. 8, 16, 26, 107, 152). Mr. Tally filed a motion to suppress the statement, alleging in part that he was detained and questioned without first being advised of his rights under **Miranda v. Arizona,** 384 U.S. 436 (1966) (L.F. 15). Defense counsel argued at

the motion hearing that Mr. Tally reasonably felt he was not free to leave while Investigator Hamilton was questioning him (Tr. 40-42). Judge Scott overruled the motion (Tr. 45). Counsel objected at trial when the officers repeated his incriminating statement (Tr. 106, 152), and included the claim of error in his motion for new trial (L.F. 36). The issue is preserved for review. **Rule 29.11**.

Factual issues on motions to suppress, including the question of whether a suspect was in custody when interrogated, are mixed questions of law and fact. **State v. Werner**, 9 S.W.3d 590, 595 (Mo. banc 2000). When a defendant alleges that his constitutional protection against forced self-incrimination has been violated, this Court's review of the trial court's ruling is a two-part inquiry: the Court must defer to the trial court's findings of fact and credibility determinations, but conducts a *de novo* review of the court's conclusions of law. *Id.* While the Court defers to the trial court judge on matters of witness credibility, the lower court's credibility determinations are not dispositive of the "in custody" inquiry. **Werner**, *Id.*, (*citing,* **Thompson v. Keohane**, 516 U.S. 99, 113 (1995)).

The burden is on the State to show by a preponderance of the evidence that the motion to suppress should be overruled. **State v. Birmingham**, 132 S.W.3d 318 (Mo. App., S.D. 2004) (reversed where State presented no evidence that Birmingham was not in custody.)

Miranda and its constitutional underpinnings

The Fifth Amendment to the United States Constitution states " No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

Defendants and other witnesses in state prosecutions are afforded the protections of the Fifth Amendment through the Due Process Clause of the Fourteenth Amendment. **Dickerson v. United States**, 530 U.S. 428, 438-439 (2000) (*citation omitted*). Protection against coerced self-incrimination under the Missouri Constitution is commensurate with that provided by the Fifth Amendment. **Werner**, 9 S.W.3d at 595 (Mo. banc 2000); Article I, Section 19, Mo. Const.

In **Miranda v. Arizona**, the Supreme Court announced a requirement that a person being interrogated while in police custody must be advised of his rights against compelled self-incrimination and to the assistance of counsel, along with warnings regarding the consequences of waiving those rights, as a prerequisite to the admissibility of any incriminating statement as substantive evidence of his guilt. 384 U.S. 436, 479 (1966). "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." **Miranda**, 384 U.S. at 444. The **Miranda** rule creates a presumption of coercion when the warnings are not given prior to a custodial interrogation. **United States v. Patane**, 524 U.S. ___, 124 S.Ct. 2620, 2627 (2004).

Investigator Hamilton interrogated Mr. Tally

Before turning to the issue of custody, Mr. Tally asserts there can be no doubt that Investigator Hamilton's "conversation" with him was an interrogation. In **Rhode Island v. Innis**, 446 U.S. 291, 300-302 (1980), the Supreme Court concluded that the **Miranda** warning is required when a person in custody is

subjected to either express questioning or its functional equivalent, *i.e*., words or actions by the police which they should know are reasonably likely to elicit an incriminating response from the suspect. Mr. Tally initially denied the plants were his (Tr. 106). Officer Hamilton described his next comments to Mr. Tally as a "bluff" at the hearing on the motion to suppress (Tr. 16):

> Officer Hamilton: I told him that that the helicopter had observed some—what appeared to be marijuana plants out in the field, and he said "Man, I was just out there looking for rocks."
>
> And I said, "I see," and—because at that point I had—I didn't have enough information to make an arrest.
>
> So I asked him if he knew what a box camera was, and he said, "No."
>
> And I said, "Have you ever heard of those boxes where, you know, when somebody comes up to it, it sets it off and turns a camera on?"
>
> And—And he got the funny look on his face, like thinking that there was one out there, and he said "Man, those plants, there's only six or eight of them and they're only about this tall and I was only going to use them for my personal use."

(Tr. 7-8).

Later in the hearing, Investigator Hamilton said that he did not have enough information to arrest Mr. Tally at first, but "Well, I mean, I knew I was going to arrest him at the point he admitted that—that they was his plants." (Tr. 11). At

trial, Officer Hamilton explained that the bluff about the box camera was a technique he called "suggestive evidence" which he had learned in different schoolings (Tr. 106-107). "The intent is to make that person believe that there is evidence against him, to make a person who's normally lying to go ahead and—and tell the truth." (Tr. 108). Investigator Hamilton admitted he used the technique to get information from Mr. Tally (Tr. 125), showing actual knowledge that it was "reasonably likely to elicit an incriminating response from the suspect." Investigator Hamilton's questioning was the functional equivalent of an interrogation.

Mr. Tally was in custody

"[T]he safeguards prescribed by **Miranda** become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' " **Berkemer v. McCarty**, 468 U.S. 420, 440 (1984). The Supreme Court has summarized the in-custody inquiry as: given the circumstances surrounding the interrogation, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave? **Yarborough v. Alvarado**, 524 U.S. ___, 124 S.Ct. 2140, 2149 (2004), *citing* **Thompson v. Keohane**, 516 U.S. 99 (1995).

The factors to be considered in deciding if a given set of circumstances constitute custody are the "objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being questioned." **Stansbury v. California**, 511 U.S. 318, 323 (1994). But an officer's subjective view of the situation is relevant if it is communicated to the

suspect, and affects the way a reasonable person in the suspect's position perceives his freedom to leave. **Stansbury**, 511 U.S. at 325.

This Court has approached the question of custody by examining the totality of the circumstances in view of a suspect's freedom to leave the scene, as well as the purpose, place, and length of the interrogation. **Werner**, 9 S.W.3d at 595, *citing* **United States v. Griffin**, 922 F.2d 1343, 1349 (8th Cir. 1990).

In **Werner**, the Court referenced six factors set out in **Griffin** for use in determining the issue of custody. In reviewing the totality of the circumstances, an affirmative showing on certain factors militates against a finding that the suspect was in custody when interrogated:

(1) Whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not under arrest;

(2) Whether the suspect possessed unrestrained freedom of movement during questioning; and

(3) Whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to answer questions.

Werner, *Id.*

Conversely, if the following conditions were present in the situation, they indicate coercion and point to the existence of custody:

(4) Whether strong arm tactics or deceptive stratagems were employed during questioning;

(5) Whether the atmosphere was police dominated;

(6) Whether the suspect was placed under arrest at the termination of questioning.

Id. It is not necessary that factors (4) through (6) be found in the affirmative to support a conclusion that the interrogation was custodial, and a strong showing in one may compensate for a weak showing in the others. **Werner**, 9 S.W.3d at 596.

A review of the totality of the circumstances according to factors set out in **Griffin** and **Werner** shows that Mr. Tally was in custody. Applying the evidence to the factors by group:

(1) *Whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not under arrest*. There was no evidence that Investigator Hamilton told Mr. Tally the questioning was voluntary; there was no evidence he told Mr. Tally he was free to leave, and when asked on redirect examination if Mr. Tally was in fact free to leave, Investigator Hamilton did not answer the question (Tr. 18); when Mr. Tally asked if he was under arrest, Investigator Hamilton said "No, not at this time." (Tr. 18), then executed the box-camera "bluff" in order to get incriminating information from him (Tr. 8, 15-16, 125).

(2) *Whether the suspect possessed unrestrained freedom of movement during questioning*. Investigator Hamilton testified that Mr. Tally was on his knees with his hands in the air for only a short time before getting up and

coming over to have a "conversation" with him (Tr. 7, 125-126). However, his recollection directly conflicts with the consistent testimony of other witnesses, strongly suggesting that Investigator Hamilton recalled the sequence of events incorrectly. Deputy Wood testified that Mr. Tally was still kneeling on the ground when he approached from the rear and heard him make the admission (Tr. 25-26, 160), and that Mr. Tally did not get up until after Deputy Wood cuffed and arrested him at Investigator Hamilton's direction (Tr. 160). Joe Horman, who testified as part of the State's case, said Mr. Tally remained on the ground while the investigator talked to him (Tr. 141), and was still kneeling down when Deputy Wood arrived and handcuffed him (Tr. 145). Mr. Tally testified that he remained kneeling during all of the questioning (Tr. 197). But even if Mr. Tally had risen from his knees and Investigator Hamilton for the "conversation," the helicopter had just landed behind him, and Deputy Wood approached from the rear after getting out of it (Tr. 25). Regardless of Mr. Tally's posture during the questioning—kneeling or standing before Investigator Hamilton—the presence of the helicopter and other law enforcement officers precluded an unrestrained freedom of movement.

(3) Whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to answer questions. Mr. Tally looked up to see a helicopter hovering over his head, then obeyed when the pilot motioned for him to head to the house (Tr. 158-159). Once he came within

view, Investigator Hamilton ordered Mr. Tally to get on his knees before they conversed (Tr. 6-7, 14-15, 104-105). This was not a consensual encounter.

Because this first set of **Werner** factors is answered negatively, they support Mr. Tally's argument that he was in custody when he was interrogated. **Werner**, 9 S.W.3d at 595.

(4) *Whether strong arm tactics or deceptive stratagems were employed during questioning*. Investigator Hamilton was candid at trial about the purpose of his box-camera bluff: "The intent is to make that person believe that there is evidence against him, to make a person who's normally lying to go ahead and—and tell the truth." (Tr. 108). He conceded that the purpose was to get information (Tr. 125). The technique was effective and would have been permissible as an interrogation technique—after Mr. Tally was advised of his rights.

(5) *Whether the atmosphere was police dominated*. Even though Investigator Hamilton was not in uniform and did not have a weapon, Mr. Tally went to his knees as ordered (Tr. 104-105), indicating that he found the circumstances compelling. Mr. Tally testified that the helicopter followed him very closely (Tr. 196), and Deputy Wood recalled that it landed nearby while Mr. Tally was still on his knees (Tr. 25, 145). Mr. Tally reasonably believed that the police were in control of this situation.

(6) *Whether the suspect was placed under arrest at the termination of questioning*. He was (Tr. 27, 108, 160).

Thus, **Werner** factors (4) through (6) are found in the affirmative, and support a conclusion that the interrogation was custodial, as did the answers to the previous set of factors.

The Eighth Circuit has recently distanced itself from the **Griffin** analysis, referencing instead the Supreme Court's **Thompson** standard—whether in the circumstances, a reasonable person would feel free to terminate the interrogation and leave. **United States v. Lebrun**, 363 F.3d 715, 720 (8th Cir. 2004). "[T]he critical inquiry is not whether interview took place in coercive or police dominated environment, but rather whether the defendant's 'freedom to depart was restricted in any way.'" *Id*., *citing* **Oregon v. Mathiason**, 429 U.S. 492, 495 (1977). In **United States v. Czichray**, the court scorned the **Griffin** factors: "The debatable marginal presence of certain judicially-created factors … cannot create the functional equivalent of formal arrest where the most important circumstances show its absence." 378 F.3d 822, 827-828 (8th Cir. 2004). In both **Lebrun** and **Czichray**, the Eighth Circuit relied most heavily on the government agents' repeated communications to the suspects that they could leave or otherwise terminate the interrogation.

Thompson's focus on a suspect's ability to physically escape the interrogation, and the case's disregard of a coercive environment except as it would affect a reasonable man's perception of his freedom to leave or end the

interrogation, is consistent with the Supreme Court's earlier decisions on the question of custody. In **Mathiason**, *supra*, the defendant went voluntarily to the police station, was informed immediately that he was not under arrest, remained there only 30 minutes, and was permitted to leave the station after his statement. 429 U.S. at 495. The Court rejected Mathiason's argument that the inherently coercive environment of the police station was sufficient to establish custody requiring warnings under **Miranda**, because there was "no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way." *Id.*

In **California v. Beheler**, 463 U.S. 1121 (1983), the Court found that Beheler was not in custody, despite the fact that he knew he was a suspect, because he came to the police station of his own will, was told that he was not under arrest, and was released after making incriminating statements. As in **Mathiason**, the Court's decision was based on the suspect's ability to simply leave: "Beheler's freedom was not restricted in any way whatsoever." 463 U.S. at 1123.

In concluding that questions ask during a routine traffic stop need not be preceded by **Miranda** warnings, the Court found that a reasonable person would not believe himself to be in custody due to the limited purpose and temporary nature of such stops. **Berkemer v. McCarty**, 468 U.S. 420 (1984). "[T]he safeguards prescribed by **Miranda** become applicable as soon as a suspect's

freedom of action is curtailed to a degree associated with formal arrest." **Berkemer**, 468 U.S. at 440.

Stansbury v. California, 511 U.S. 318 (1994), continued the focus on a reasonable person's belief about his freedom to end the interrogation. Courts must examine "all of the circumstances surrounding the interrogation" to determine how a reasonable person in the suspect's position would assess his freedom to leave. 511 U.S. at 322, 325.

The prominence of objective, physical factors in determining the existence of custody was repeated most recently in **Yarborough v. Alvarado**, 524 U.S. ___, 124 S.Ct. 2140 (2004). There, the Court noted factors suggesting that Alvarado was in not custody, including his arrival at the police station with his parents at a time convenient to them, that Alvarado was not threatened with arrest, expected the interview to be short, and was permitted to go home after it was over. **Alvarado**, 124 S.Ct. 2149-2150. "[A]ll of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave." *Id.*

The totality of the circumstances surrounding the detention and interrogation of Mr. Tally would have caused a reasonable person to believe that he was not at liberty to leave, as the test for custody is articulated in **Thompson**. Even if Mr. Tally was on his knees only briefly, as Investigator Hamilton recalled, the helicopter that followed him in from the field landed nearby (Tr. 25). Officer

Wood got out of the helicopter and put handcuffs on Mr. Tally while he was still on his knees (Tr. 160).

Most significant, when Mr. Tally asked if he was under arrest, Investigator Hamilton said "No, not at this time." (Tr. 18). A reasonable person in Mr. Tally's circumstances would have understood the response to mean "Not yet." Viewed objectively, these circumstances would not lead a reasonable person to believe that he could simply leave.

Conclusion

The State did not show that Mr. Tally was not in custody when he was interrogated by Investigator Hamilton. The officer's failure to precede the questioning with a **Miranda** warning therefore violated Mr. Tally's constitutional rights, and the trial court erred in not suppressing his statement.

Mr. Tally was prejudiced by this error because without his admissions the evidence was insufficient to support the conviction. The mere presence of the accused on shared premises where contraband is located or being manufactured is not sufficient to make a submissible case. **State v. Withrow**, 8 S.W.3d 75, 80 (Mo. banc 1999). At the hearing on the motion to reveal the confidential informant, Investigator Hamilton said he had heard in the past that "Joey Horman was good for growing marijuana plants." (Tr. 38). Joe Horman testified that multiple people, family and non-family, were permitted on the Hormans' land to work, hunt, "and things like that." (Tr. 120, 131, 136, 143).

Nor does proximity to the contraband alone establish ownership; there must be other incriminating evidence implying that the accused knows of the manufacturing process and it is under his control. *Id.* Here there was none. Mr. Tally had nothing in his hands to suggest that he had been tending the marijuana (Tr. 158, 178), nor were cultivating tools or other cultivating paraphernalia found when the officers dug it up.

Without Mr. Tally's statement, the evidence showed only that he was spotted in an open field, fifty yards from one marijuana patch that was camouflaged by undergrowth, and a hundred yards from another (Tr. 122, 169, 176). The State recognized that the case hinged on Mr. Tally's statement, referencing his "confession" at least six times in fifteen minutes during closing (Tr. 212, 214, 215, 216, 223). Mr. Tally's conviction was based on a statement obtained in violation of his constitutional rights, and this Court should reverse the sentence and judgment and remand for a new trial.

CONCLUSION

Because the trial court erred in overruling appellant's motion to suppress his statement, and thereafter admitting it into evidence over his objection, as set out above, this Court should reverse the judgment and sentence and remand for a new trial.

Respectfully submitted,

_____
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Certificate of Compliance and Service

I, Irene Karns, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. Excluding the cover page, the signature block, appendix and this certificate of compliance and service, the brief contains 4,969 words, which does not exceed the number of words allowed for an appellant's brief in this Court.
- ✓ The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, SP1, updated on September 17, 2004. According to that program, these disks are virus-free.
- ✓ Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were shipped by United Parcel Service this 22nd day of September, 2004, to Deborah Daniels, Assistant Attorney General, 1530 Rax Court, Jefferson City, Missouri 65109.

_____

Irene Karns

IN THE
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APPENDIX TO APPELLANT'S SUBSTITUTE BRIEF

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